85-840

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD A. GINSBURG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the RICO forfeiture statute, 18 U.S.C. § 1963 (a)(1), prior to amendment, requires a defendant to forfeit any other property he might own equivalent in value to an interest which was subject to forfeiture but no longer exists at conviction?

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PRAYER

Petitioner Richard A. Ginsburg respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals Seventh Circuit *En Banc*, 773 F.2d 798, appears in Appendix A, attached hereto. The Order of the United States Court of Appeals for the Seventh Circuit panel reversing and remanding the District Court's forfeiture order appears in Appendix B, attached hereto. The Judgment Order and

Sentence of the United States District Court for the Northern District of Illinois appears in Appendix C, attached hereto.

JURISDICTION

The Opinion and Order of the United States Court of Appeals of the Seventh Circuit *En Banc* was entered on September 13, 1985. This Petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I, Section 9, clause 3 of the United States Constitution provides:

> No Bill of Attainder or Ex Post Facto Law Shall Be Passed.

The Organized Crime Control Act of 1970, Pub.L.No. 94-452, tit. IX, § 901(a), 84 Stat. 943 (18 U.S.C. § 1963 prior to amendment), is set out in Appendix D, attached hereto.

The Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, § 302, 98 Stat. 1837, 2040 (amending 18 U.S.C. § 1963), is set out in Appendix E, attached hereto.

STATEMENT OF THE CASE

Petitioner Richard A. Ginsburg and his co-defendant Theodore J. Schmidt were partners in a law firm that represented clients before the Cook County Board of [Tax] Appeals between January 1976 and September 1982. The Board of Appeals reviews the real property tax assessments and determines property tax liability. It was stipulated between the

parties that the firm received $450,000 in legal fees during that period from cases for the Board of Appeals. On September 9, 1982, Ginsburg and Schmidt were charged in an indictment with 19 counts of mail fraud (18 U.S.C. § 1341) and 1 count of racketeering in violation of section 1962 of the Racketeer Influence and Corrupt Organizations ("RICO") Chapter of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 *et seq.* (1982). The indictment alleged that Ginsburg and Schmidt had bribed employees at the Board of Appeals to obtain favorable treatment of their cases.

Following a jury trial, Ginsburg was found guilty of all 20 counts. The jury returned a special verdict on the RICO count, finding Ginsburg had an interest in the legal fees received by the firm of Schmidt & Ginsburg between January 1976 and September 1982 for cases processed at the Board of Appeals. Ginsburg was sentenced to five years probation on each of counts 1 through 20, to run concurrently, with the condition that he make restitution in the sum of $150,000.00 and provide 1,000 hours of community service. He was further ordered to forfeit his one-half interest in the firm's legal fees, or $225,000, to the government under RICO's forfeiture provision, 18 U.S.C. § 1963(a)(1) (prior to 1984 amendment). The amount of restitution was to be credited against the forfeiture.

The government presented no evidence at trial that Ginsburg possessed or controlled, at the time of his conviction, the money that he had received in legal fees between 1976 and 1982 from Board of Appeals cases.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The decision below is a judicial expansion of the RICO forfeiture statute, unsupported by either the language of the statute, its legislative history or past precedent from the Seventh Circuit.

The Court should review the decision below because the reasoning of the Court of Appeals conflicts with the reasoning of this Court in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275 (1985). This case is one of extreme importance because it is another attempt by a federal court to rewrite the RICO statute, similar to the attempt which this Court rejected in *Sedima. Id.* at 3287. To remedy what the Seventh Circuit perceived to be a flaw in the language of the RICO forfeiture statute,* the Court of Appeals reversed its own precedent and held that, if an interest obtained by a violation of section 1962 no longer exists at conviction, then the defendant must forfeit any other asset equivalent in value to the interest no longer in existence. This Court deliberately left open this question when it held in *Russello v. United States*, 464 U.S. 16 (1983), that profits were subject to RICO forfeiture. *Id.* at 29 n.3.

THE COURT OF APPEALS' HOLDING IS NOT SUPPORTED BY THE LANGUAGE OF THE STATUTE.

The Court of Appeals held that its expansion of RICO forfeiture was required by the language of section 901. App. 4a. Surely the question of the meaning of the statute's language is closer than the Court of Appeals pretends. Other courts which have interpreted the statute—including three panels from the Seventh Circuit—have not found such a broad interpretation to be required by the words of the statute. See, e.g., *United States v. Ginsburg*, App. 2b; *United States v. Alexander*, 741 F.2d 962, 968 (7th Cir. 1984); *United States v. McManigal*, 708 F.2d 276, 289 (7th Cir. 1983), *vacated on*

* Organized Crime Control Act of 1970 Pub.L.No. 94-452, tit. IX, § 901(a), 84 Stat. 943, 18 U.S.C. 1963(a) (prior to 1984 amendment). On October 12, 1984, a complete revision of § 1963 was effected by the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, tit. II, § 302, 98 Stat. 2040 (1984). The pre-amendment RICO forfeiture statute will hereinafter be cited as "section 901"; the post-amendment statute will be cited as "section 302."

other grounds, 104 S.Ct. 419 (1983), *on remand*, 723 F.2d 580, 581 (7th Cir. 1983). Petitioner submits that the language of the statute together with the nature of *in personam* forfeiture supports the view that RICO forfeiture is limited to those "interest[s] acquired or maintained in violation of section 1962" which still exist at the time of conviction. 18 U.S.C. § 1963(a)(1) (prior to amendment).

THE COURT OF APPEALS' HOLDING IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY OF THE STATUTE.

Nothing in the legislative history reveals that Congress intended to enact the drastic punishment which the Court of Appeals has formulated. Rather, there is some evidence in the legislative history which indicates that Congress intended to revive *in personam* forfeiture only in a limited way. S.Rep. No. 612, 91st. Cong., 1st. Sess. 80 (1969). In addition to its misinterpretation of the legislative history of section 901, the Court of Appeals also erroneously relied upon the recent revision of 18 U.S.C. § 1963 which was accomplished by section 302 of Title II of the Comprehensive Crime Control Act of 1984.

The Ex Post Facto Clause plainly prohibits application of section 302 to the instant case. The current Congress, displeased with the Seventh Circuit's holdings in *McManigal* and *Alexander*, apparently overruled them by incorporating the "relation back" doctrine into section 302(c). To retrospectively apply section 302 to litigants in the Seventh Circuit would convert section 302 into precisely the kind of "vindictive legislation" that the Ex Post Facto Clause has historically banned. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Moreover, section 302 cannot be given retrospective application through the artifice of a reinterpretation of section 901. A later amendment to a criminal statute, imposing harsher penalties, cannot be used to retrospectively interpret the prior act. See *United States v. Stafoff*, 260 U.S. 477, 480 (1923).

Even if the Ex Post Facto Clause did not preclude reliance upon section 302, principles of sound statutory construction do not support the conclusion reached by the Court of Appeals. Section 302 reflects Congressional sentiment in 1984, not the Congressional intent in 1970 when RICO was originally passed. That Congress chose to amend 18 U.S.C. § 1963 reflects Congress's judgment that the *Alexander* and *McManigal* opinions offered permissible readings of the language of section 901; even if the results of those cases were contrary to current Congressional policy. See *United States v. Field*, 255 U.S. 257 265 (1921) (amendment indicates Congressional recognition that prior language did not accomplish objective sought by amendment).

IT WAS IMPROPER FOR THE COURT OF APPEALS TO EXPAND THE PUNITIVE ASPECTS OF RICO FORFEITURE WHERE NO REMEDIAL PURPOSE CAN BE SERVED THEREBY.

It is improper for the Judiciary, in construing a criminal statute, to expand its punitive aspects without a compelling justification in the language of the statute and its legislative history. *United States v. Bass*, 404 U.S. 336, 348 (1971). The historic rule of lenity forbids this, instead requiring a court, when faced with two alternative interpretations of a criminal statute, to adopt that interpretation which is less harsh. Where no remedial purpose can be furthered by an expansive reading of the RICO statute, then the rule of lenity forbids a court from adopting that reading. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3283 n.10. In this case, the Court of Appeals completely ignored the rule of lenity by adopting an interpretation of section 901 which expands the purely punitive aspects of RICO forfeiture even though no remedial purpose can be served thereby.

The remedial purpose of RICO forfeiture is to separate the racketeer from the enterprise and from his "dishonest gains."

United States v. Russello, 464 U.S. at 28. By enacting RICO forfeiture, Congress sought to prevent racketeering proceeds from being used to finance future racketeering activity. *Id.* at 27-28. To be sure, Congress also intended RICO forfeiture to be punitive, and harshly so. But the remedial purpose of RICO forfeiture—at least under section 901—is to prevent racketeering proceeds from being used to finance future racketeering activity.

Although a defendant may have benefitted from the racketeering proceeds he has spent, the question of whether or not he should be punished for that benefit by forfeiture—in addition to a substantial fine and term of imprisonment—is a question for the Congress, not the Judiciary, to answer. If section 901 was defectively drafted as the Court of Appeals perceived it to be, then the defect was one for the Congress, not the Judiciary, to correct. *Sedima, S.P.R.L. v. Imrex Co.,* 105 S.Ct. at 3287. That Congress chose to revise 18 U.S.C. § 1963 demonstrates that the Court of Appeals' holding is an improper arrogation of legislative power.

CONCLUSION

Both the language of section 901 and its legislative history support the conclusion that RICO forfeiture, as originally enacted, permitted forfeiture of only those proceeds still in existence at the time of conviction. If any ambiguity can be found in the statutory language, then the rule of lenity requires the rejection of any interpretation of section 901 which would merely expand the punitive aspects of RICO forfeiture without furthering the remedial purpose of RICO forfeiture. The Court of Appeals exceeded its proper role in statutory construction by giving an expansive reading to the purely punitive aspects of RICO forfeiture.

For the foregoing reasons, Petitioner Richard A. Ginsburg respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1765

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD A. GINSBURG,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 619—Milton I. Shadur, *Judge.*

ARGUED JUNE 17, 1985—DECIDED SEPTEMBER 13, 1985

Before CUMMINGS, *Chief Judge*, BAUER, WOOD, CUDAHY, ESCHBACH, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

FLAUM, *Circuit Judge.* This appeal presents the issue of whether the government must prove beyond a reasonable doubt the existence, at the time of a defendant's conviction, of any interest that the defendant has acquired in violation of section 1962 of the Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 *et seq.* (1982) ("RICO"), before the government can obtain a forfeiture of that interest under section 1963(a)(1) of RICO. A panel of this court, in reliance on prior decisions of this circuit, held in an unpublished order that the government did bear such a burden, *United States v.*

Ginsburg, No. 84-1765 (7th Cir. Jan. 29, 1985), and a majority of the court subsequently voted to rehear the case *en banc*. We now hold that section 1963(a)(1) imposes no such burden of proof on the government, and accordingly affirm the district court's judgment ordering defendant Richard A. Ginsburg to forfeit the sum of $225,000 to the United States.

I.

Because the facts of this case are not in dispute on appeal, we will summarize them briefly. Defendant Ginsburg and his codefendant Theodore J. Schmidt were partners in a law firm that represented clients before the Cook County Board of (Tax) Appeals between January 1976 and September 1982. It was stipulated that the firm received $450,000 in legal fees during that period from cases that were processed at the Board of (Tax) Appeals. On September 9, 1982, Ginsburg and Schmidt were charged in an indictment with nineteen counts of mail fraud (18 U.S.C. § 1341) and one count of violating section 1962(c) of RICO. The indictment alleged that Ginsburg and Schmidt had bribed employees at the Board of (Tax) Appeals to obtain favorable treatment of their cases.

Following a jury trial, Ginsburg was found guilty on all twenty counts. The jury also returned a special verdict on count 20, the RICO count, finding that Ginsburg had an interest in the legal fees received by the firm of Schmidt & Ginsburg between January 1976 and September 1982 for cases processed at the Board of (Tax) Appeals. Ginsburg was sentenced to five years probation on each of counts 1 through 20, to run concurrently, with the condition that he make restitution in the sum of $150,000 and provide 1,000 hours of community service. He was further ordered to forfeit his one-half interest in the firm's legal fees, or $225,000, to the government under RICO's forfeiture provision, 18 U.S.C. § 1963(a)(1) (1982). The amount of restitution was to be credited against the forfeiture.

The government presented no evidence at trial that Ginsburg possessed or controlled, at the time of his con-

viction, the money that he had received in legal fees between 1976 and 1982. On appeal, Ginsburg does not contest his conviction or assert any trial errors, but rather argues that the trial court's forfeiture order must be vacated because the government failed to prove beyond a reasonable doubt that the legal fees he had received between 1976 and 1982 were still in existence at the time of his conviction in March 1984.

II.

At the time of Ginsburg's conviction, section 1963(a) provided that

> [w]hoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1982).[1] In determining the scope of this section, we must "look first to its language. If the

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[1] Congress amended this provision in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 302, 98 Stat. 2040 (1984), to clarify that the phrase "any interest" in section 1963(a)(1) includes the proceeds, income, or profits derived from a pattern of racketeering activity. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 202. The amendment to section 1963(a) has no effect on this case, however, since it was already settled law that section 1963(a)(1) provides for the forfeiture of the profits and proceeds of racketeering activity, *see Russello v. United States*, 464 U.S. 16, 22 (1983); *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1770 (1985), and thus the legal fees received by Ginsburg between 1976 and 1982.

statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Russello v. United States*, 464 U.S. 16, 20 (1983) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). We believe that the language of section 1963(a)(1) is clear — whoever violates section 1962 of RICO "shall forfeit to the United States . . . any interest he has acquired . . . in violation of section 1962." Nothing in the language of section 1963(a)(1) provides or even suggests the limitation that the interest acquired in violation of section 1962 must be in existence at the time of conviction before it can be forfeited.

The defendant argues that despite its plain language, section 1963(a)(1) must be read as imposing on the government the burden of proving the existence, at the time of conviction, of a defendant's profits and proceeds from racketeering activity. This argument is primarily based on the fact that RICO's criminal forfeiture provision is an *in personam* proceeding, rather than a civil *in rem* proceeding against the property itself, and thus that the government's interest in the property does not attach until the time of the defendant's conviction of the crime for which the forfeiture is sought. Although we agree with the defendant's premises, we cannot agree with his conclusion that because the government's interest does not attach until the time of conviction, it is limited to whatever proceeds are left at the time of conviction.

Congress's use of the criminal forfeiture sanction in RICO revived a punishment that had not been used in the United States since 1790. *See United States v. McManigal*, 708 F.2d 276, 288 (7th Cir.), *vacated on other grounds*, 104 S. Ct. 419 (1983); Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L. Rev. 747, 747-48 (1985). As the Fifth

Circuit stated in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980):

> The forfeiture penalty incorporated in section 1963 differs from other presently existing forfeiture provisions in federal statutes. Under other statutes, the forfeiture proceeding is in rem against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting section 1963, however, Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment.

609 F.2d at 813 n.15. *See also United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985), *petition for cert. filed*, 53 U.S.L W. 3870 (U.S. May 24, 1985) (No. 84-1853); *United States v. Kravitz*, 738 F.2d 102, 106 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1752 (1985); *United States v. Cauble*, 706 F.2d 1322, 1347, 1349 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 996 (1984); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). RICO forfeiture is a punishment imposed on a guilty defendant. It deprives that defendant of all of the profits or proceeds that he has acquired through racketeering activity, regardless of whether those assets are themselves "tainted" by use in connection with the illicit activity. *See* Reed, *supra*, at 748 (the scope of an *in personam* forfeiture is defined by the scope of the defendant's criminal conduct).

Although the government's interest in property subject to criminal forfeiture does not attach until the defendant is convicted of the crime for which the forfeiture is imposed, *see McManigal*, 708 F.2d at 289 n.6 (government's right to the property attaches on conviction), it does not follow, as the defendant argues, that the extent of the government's interest is limited to whatever the defendant still has in his possession at the time of conviction or that the government bears the burden of

proving that the dollars obtained in violation of section 1962, often many years earlier, are the same dollars in the defendant's bank account at the time of conviction. The characteristics of criminal forfeiture argue against that conclusion. Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, "it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction." *United States v. Conner*, 752 F.2d at 576. It therefore does not matter whether the government recovers the identical dollars that the defendant received in violation of section 1962, as long as the amount that the defendant acquired in violation of the statute is known. *Id.*

In short, while the government's interest in the profits or proceeds of racketeering activity does not *attach* until conviction, its interest *vests* at the time of the act that constitutes the section 1962 violation and cannot subsequently be defeated, as far as section 1963(a)(1) is concerned, if the defendant dissipates or transfers away the proceeds subject to forfeiture.[2] The government's

[2] It may of course be possible for a defendant to defeat forfeiture as a practical matter by transferring away or hiding his assets in anticipation of his conviction. This was one of the problems that Congress sought to address in the 1984 amendments to section 1963. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 195-96, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 198-99. The Comprehensive Crime Control Act attempted to alleviate the problem of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction by expanding the government's ability to obtain restraining orders, setting out clear authority for voiding improper pre-conviction transfers of assets subject to criminal forfeiture, and authorizing the forfeiture of substitute assets when the property originally subject to forfeiture is unavailable at the time of conviction. *Id.* at 197-98, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 200-01. (The substitute asset provision was added by

(Footnote continued on following page)

right to forfeit the profits or proceeds of racketeering activity under section 1963(a)(1) is therefore not limited to whatever is left over or unspent at the time of conviction, but instead includes the entire amount that was acquired by the defendant in violation of RICO.

Having concluded that section 1963(a)(1) is clear and unambiguous on its face, we now turn to the legislative history of RICO. "'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure" from the language of a statute when that language is plain and unambiguous. *United States v. Albertini*, 105 S. Ct. 2897, 2902 (1985) (quoting *Garcia v. United States*, 105 S. Ct. 479, 482-83 (1984)). We believe that the legislative intent behind RICO's forfeiture provision is not contrary to, and in fact strongly supports, our interpretation of section 1963(a)(1). As virtually every court that has interpreted any provision of RICO has recognized, RICO's legislative history clearly demonstrates that the statute was intended as a comprehensive and unprecedented attack on organized crime and its economic bases. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3286 (1985); *Russello v. United States*, 464 U.S. at 26. Congress's declared purpose in enacting RICO was "to seek the eradication of organized crime in the United States by . . . establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Pub. L. No. 91-452, § 1, 84 Stat. 923 (1970).

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[1] *continued*

§ 302 of the Act but deleted by § 2301(b), so never took effect. Pub. L. No. 98-473, tit. II, §§ 302, 2301(b), 98 Stat. 2040-41, 2192 (1984). The reason for the last-minute deletion of what would have been § 1963(d) is unclear.). It must be emphasized that the fact that section 1963 as originally enacted proved to be somewhat ineffectual in preventing defendants from placing their assets beyond the reach of the government, and thus preventing forfeiture as a practical matter, does not mean that the government's legal interest in those assets was thereby defeated, as defendant suggests.

Congress further directed that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." *Id.* § 904(a), 84 Stat. 947. The statute is replete with words and phrases of extraordinary breadth, *see Sedima*, 105 S. Ct. at 3286; *Russello*, 464 U.S. at 21-22; *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985), further evidencing the congressional intent to enact a statute of exceedingly broad scope.

The goal of RICO's forfeiture provision was "to remove the profit from organized crime by separating the racketeer from his dishonest gains." *Russello*, 464 U.S. at 28. The defendant argues that if the racketeer's profits are no longer in existence at the time of conviction, then they are no longer available to the defendant and thus that the remedial purpose of the statute will have been served. To the extent that our prior holdings in *McManigal*, 708 F.2d at 289 (reaffirmed in *United States v. McManigal*, 723 F.2d 580, 581 (7th Cir. 1983)), and *United States v. Alexander*, 741 F.2d 962, 968 (7th Cir. 1984), support this result, we overrule those decisions and reject the defendant's contention. What the defendant's argument overlooks is the fact that a racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women, and song has profited from organized crime to the same extent as if he had put the money in his bank account. Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment, college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes. In order to truly separate the racketeer from his dishonest gains, therefore, the statute requires him to forfeit to the United States the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession. To require less would seriously undermine the intended deterrent effect of RICO forfeiture; a racketeer would have no incentive to discontinue his racketeering activity if he could freely use the proceeds of

that activity to enrich his life up until the moment of his eventual conviction, at which time he would only be required to forfeit whatever was left over. In sum, the legislative history of RICO does not support the defendant's interpretation of section 1963(a)(1) as requiring the government to trace the proceeds of racketeering activity in order to prove that they are still in existence at the time of conviction.

The defendant's construction of section 1963(a)(1) is further contrary to the intent of RICO's forfeiture provision because it would render the statute, as a practical matter, a virtual nullity. *Cf. Sedima*, 105 S. Ct. at 3286 (rejecting narrow reading of § 1964(c) of RICO that would in effect eliminate the section from the statute). First, defendants would be encouraged to spend or transfer away their forfeitable interests prior to conviction, and second, it would be next to impossible for the government ever to overcome, especially where money is involved, the tracing burdens that the defendant's position would require. We therefore reject the defendant's interpretation of section 1963(a)(1) as having no basis in the plain language of the section and as being contrary to the purposes and intended effect of forfeiture under RICO.

We note that Congress amended RICO's forfeiture provision as part of the Comprehensive Crime Control Act of 1984, so that it now provides that "[a]ll right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C.A. § 1963(c) (West Supp. 1985). This and other amendments to section 1963, along with the legislative intent behind the changes, further support our conclusion that Congress never intended to impose on the government the burdens of tracing and proof that would be necessitated by the defendant's position in this case. While it is true that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Russello*, 464 U.S. at 26 (quoting *United States v. Price*, 361 U.S. 304, 313

(1960)), we believe that the 1984 amendments merely confirm the already clearly-established legislative intent behind RICO's forfeiture provision, which was to aid, rather than impede, the government's efforts to punish and deter racketeering activity by removing the profit from organized crime.

III.

In conclusion, we hold that nothing in the plain language or the legislative history of section 1963(a)(1) imposes on the government the burden of proving that the proceeds of racketeering activity are still in existence able the time of a defendant's conviction before the government can obtain a forfeiture of those proceeds under RICO. We therefore affirm the district court's judgment ordering the defendant to forfeit to the United States the proceeds of his illegal activity.

CUMMINGS, *Chief Judge*, concurring. Because of the above-quoted clarifying amendment to RICO's forfeiture provision, I join in the affirmance of the district court's judgment.

CUDAHY, *Circuit Judge*, concurring. I concur in the result and in the majority's analysis but I think certain points would be helpful in focusing on the precise issue being resolved here.

In *McManigal I*, 708 F.2d 276 (7th Cir.), *vacated*, 104 S. Ct. 419 (1983), the government petitioned for forfeiture under two different theories. Under the first theory, it claimed that the legal fees were proceeds of an interest acquired in violation of section 1962, and so were forfeitable under section 1963(a)(1). Under the second theory, it claimed that the defendant's share of the law firm's accounts receivable was an interest in the enterprise, and

thus forfeitable under section 1963(a)(2). These were clearly alternative theories; either would support forfeiture. This court held that proceeds were not an interest under section 1963(a)(1), and that an interest in an enterprise must be in existence at the time of conviction to be forfeitable under section 1963(a)(2). Because neither theory was satisfied, the forfeiture order was vacated.

In *Russello v. United States*, 104 S. Ct. 296 (1983), the Supreme Court held that a forfeitable interest under section 1963(a)(1) included proceeds and profits of an interest acquired in violation of section 1962. Thus our holding on the first theory in *McManigal I* was overruled. The Court vacated *McManigal I* for reconsideration in light of *Russello*.

In *McManigal II*, 723 F.2d 580 (7th Cir. 1983), this court reversed the district court's order forfeiting $99,700 to the United States. *McManigal II* is overruled today by the *en banc* majority's opinion insofar as it concerns the first theory, which deals with section 1963(a)(1). However, the holding in *McManigal II* dealing with the second theory is not overruled. That theory holds that under section 1963(a)(2) an interest in an enterprise is not forfeitable unless it is in existence at the time of conviction.[1] Section 1963(a)(2) was not at issue in *Russello*, and the Supreme Court there was careful to distinguish what it called the narrower section 1963(a)(2) from the broader section 1963(a)(1).

RIPPLE, *Circuit Judge*, with whom, FAIRCHILD, *Senior Circuit Judge*, joins, dissenting. Today, the Court establishes a broad remedial device which Congress, at least at

[1] This second theory would not have supported forfeiture in *McManigal II* because no accounts receivable were in existence at the time of defendant's conviction.

the time of the passage of the statute in question,[1] was unwilling to provide. While posing a narrow question couched in procedural language, the Court actually answers a considerably broader question. The Court frames the issue as whether the government, before obtaining a forfeiture, must prove beyond a reasonable doubt the existence, at the time of the defendant's conviction, of any interest that the defendant acquired in violation of section 1962 of the Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act of 1970 (RICO), 18 U.S.C. §§ 1961-68 (1982). However, the Court answers a broader question by holding that the government need not establish *any* relationship between the interest ordered forfeited in the judgment upon conviction and the RICO violation. Consequently, the Court allows the government to reach the defendant's personal assets and to seize any property equivalent to $225,000, whether or not the assets have any connection with the illegal enterprise. The Court provides the government with a valuable and possibly necessary weapon in the war on organized crime. However, the proper inquiry is not whether the government needs this weapon but whether Congress, when it enacted the statute which governs this case, authorized a forfeiture of property not derived from a violation of section 1962.

The Court's reluctance to give a comparatively restrictive interpretation to a section of RICO is understandable. Both the executive and the legislative branches of government have invested a great deal of time, money and energy in dealing with a serious national problem which requires an approach different from that used to combat ordinary criminal activity. Indeed, the Congress has specifically mandated that the Judiciary interpret the

[1] As part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984), Congress amended 18 U.S.C. § 1963. Since the majority did not reach the question of the retroactive application of the amended statute or whether such retroactive application would violate the ex post facto clause, we decline to address those issues as well.

statute so as to effectuate its broad remedial purposes. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)—a mandate which the Supreme Court has emphasized consistently in its own interpretation of the statute. *Sedima, S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, 105 S. Ct. 3275, 3286 (1985); *Russelo v. United States*, ____ U.S. ____, ____, 104 S. Ct. 296, 302 (1983). These considerations are quite important in interpreting all sections of RICO. They are only the beginning of the inquiry, however, and do not, by themselves, provide a sufficient framework for the interpretation of any specific section. A more precise analysis of the text of the particular section and its legislative history is necessary. We therefore turn to an examination of the text of the forfeiture provision, as it existed at the time of Ginsburg's conviction, and of the relevant legislative history.

I.

The Court holds that its broad interpretation of section 1963(a)(1) is required by the "plain language" of this section. However, the statute is hardly clear or unambiguous. The words of the statute—standing alone—do not manifest a congressional intent to subject to forfeiture the defendant's property owned at the time of conviction or acquired thereafter, even if it has no connection to the illegal enterprise. Indeed, the ambiguity of the statutory language has, until now, been acknowledged by commentators who have critiqued it,[2] courts, including this one, which have interpreted it,[3] and by a later

[2] *See generally* Storey, *RICO Forfeitures: A General View*, in Techniques in the Investigation and Prosecution of Organized Crime 296 (G. Blakey ed. 1980).

[3] *See United States v. McManigal*, 708 F.2d 276, 289 (7th Cir. 1983) (reaffirmed in *United States v. McManigal*, 723 F.2d 580, 581 (7th Cir. 1983)). *See also United States v. Ginsburg*, No. 84-1765 (7th Cir. Jan. 29, 1985) (The panel in this case, after citing

(Footnote continued on following page)

Congress which found that its ambiguity was so pervasive as to require new legislation.[4]

At the time of Ginsburg's conviction, section 1963(a) provided:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a). The Court is correct that nothing in section 1963(a)(1) explicitly provides that the interest to be forfeited must be in existence at the time of conviction. However, it is also true that nothing in that section suggests that the government may seize *any* property equivalent in value to the interest acquired or maintained in violation of section 1962. Certainly, until today, this Court did not consider such a broad interpretation to be dictated by the words of the statute. In *United States v. McManigal*, 708 F.2d 276, 289 (7th Cir. 1983) (reaffirmed in *United States v. McManigal*, 723 F.2d 580, 581 (7th Cir.

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[3] *continued*

Alexander and *McManigal*, wrote, "[n]othing that the government argues persuades us that these cases should be overruled."); *United States v. Alexander*, 741 F.2d 962, 968 (7th Cir. 1984).

[4] In its Report on the Comprehensive Crime Control Act of 1983, Pub. L. No. 98-473 (1984), the Committee on the Judiciary, United States Senate, noted that the General Accounting Office found the current forfeiture provisions replete with limitations and ambiguities. The new bill was intended to address these ambiguities. S. REP. NO. 225, 98th Cong., 1st Sess. 191-92 (1983).

1983)); *United States v. Alexander*, 741 F.2d 962, 968 (7th Cir. 1984) and an unpublished order in this case, *United States v. Ginsburg*, No. 84-1765 (7th Cir. Jan. 29, 1985), panels of this Court have interpreted the section contrary to the Court's interpretation of the same provision today. These conflicting opinions offer at least some evidence that the "plain language" of section 1963(a)(1) is not as clear as the Court suggests.

Other courts certainly have not considered the language to be clear. In *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982), the Fifth Circuit, while not deciding whether the government had an obligation to trace and identify the current form of monetary proceeds before it collected on a forfeiture order, recognized that the statutory language was ambiguous. *Id.* at 960-61. In reviewing that case, the Supreme Court also noted that the statute was not a model of clarity. *Russello*, 104 S. Ct. at 304 n.3 (1983).

Certainly, in amending the statute in 1984, Congress did not believe that the previous language clearly mandated the result reached by the Court today. Indeed, the legislative history of the amended statute notes the ambiguity of its predecessor. The Senate Report stated that the General Accounting Office attributed the failure of forfeiture statutes (including the one at issue in this case) partly to "the numerous limitations and ambiguities of the statutes." S. REP. NO. 225, 98th Cong., lst Sess. 191-92 (1983).

II.

Since the wording of the statute is not clear, it is necessary to turn to its legislative history. *Blum v. Stenson*, ____ U.S. ____, ____, 104 S. Ct. 1541, 1548 (1984). The legislative history with respect to the forfeiture provision is not extensive. It is evident that Congress wanted to fashion a forfeiture provision. However, there is some evidence that it did not intend to enact a provision which would reach all of the defendant's property whether

or not obtained in violation of section 1962 or traceable to such funds. The Senate Committee on the Judiciary incorporated into its report on the forfeiture provision the Attorney General's observations:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of constitutional power.

S. REP. NO. 612, 91st Cong., lst Sess. 80 (1969).

The lack of extensive legislative history supports the view that Congress intended something other than the all-encompassing provision fashioned by the Court. Forfeiture is, in American criminal law, a novel remedy. Ever since the days of the American Revolution, it has been regarded with deep suspicion.[5] While law enforcement authorities need special weapons to combat organized crime and might well require an expanded forfeiture provision, the Court ought to presume that Congress, acting against this historical background, would approach

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[5] The Constitution limits punishment for treason to forfeiture of the convicted individual's life estate. U.S. Const. art. III, § 3, cl. 2 provides: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The first Congress enacted a statute declaring that "no conviction or judgment for any of the offenses aforesaid shall work corruption of blood or any forfeiture of estate." 18 U.S.C. § 3563. In 1984, Congress repealed 18 U.S.C. § 3563 effective November 1, 1986. Pub. L. 98-473, 98 Stat. 1987 (1984). Congress replaced section 3563 with 18 U.S.C. § 3554 which permits forfeiture in accordance with RICO, 18 U.S.C. § 1963 or the Comprehensive Drug Abuse and Control Act, 21 U.S.C. § 853.

the matter carefully and would not employ vague language to fashion such a far-reaching remedy. If Congress had wanted to implement the drastic remedy formulated today by the Court, it knew how to do so. It has employed unequivocal language to achieve a similar result elsewhere. For instance, section 6331(a) of the Internal Revenue Code provides that the government may collect the taxes of a delinquent taxpayer "by levy upon all property and rights to property . . . belonging to such person." 26 U.S.C. § 6331(a). *See generally United States v. National Bank of Commerce*, ___ U.S. ___, 105 S. Ct. 2919 (1985). Similar language could have been used here if Congress had in fact intended the result which the Court reaches today.

The decision to subject to forfeiture all of the defendant's property and not just that connected to the criminal activity is a very significant policy choice. It affects not only the ability of the Government to curtail organized crime but also the capacity of the convicted individual to return someday to a lawful pursuit and to support his family. It is not asking too much for the Court to insist that the Congress—not the Judiciary—expressly make that policy choice.

The 98th Congress, in enacting the Comprehensive Crime Control Act of 1984, certainly did not believe that the predecessor statute at issue here contained such a sweeping provision. The Senate Report, for instance, noted the ambiguities of the statute[6] and also assumed that the only way by which the government could ensure the presence of assets subject to forfeiture after conviction was through the use of a restraining order.[7] More

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[6] *See supra* note 4.

[7] The Senate Report indicated that:

> No mechanism exists in current law to protect against improper transfers or concealment of assets at an earlier

(Footnote continued on following page)

importantly, in formulating a new section which would have permitted precisely what the Court seeks in this case, the Committee referred to the provision as "new to the law."[8]

III.

The Court assumes that a tracing requirement would place on the government the obligation to prove *beyond a reasonable doubt* that the assets obtained in violation of section 1962 still exist. We see no reason for that assumption. The continued existence of an interest in the enterprise is not an element of the crime proscribed by section 1962. The language of the statute provides no guidance as to how the government ought to meet the burden of showing that the interest it wishes to subject to forfeiture was acquired or maintained in violation of section 1962. Since establishing a burden of proof does not expand the scope of property subject to forfeiture, it is quite proper, in our view, for the Court to require the government to prove by a preponderance of the evidence that the specific property to be seized was acquired or maintained in violation of 28 U.S.C. § 1962. To assist the prosecutor in tracing tangible assets, a rebuttable presumption would arise that the property is subject to forfeiture under section 1963(a) once the government established that: (1) the property to be seized was acquired by the person during the period of the violation of section 1962 or within a reasonable time after the viola-

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[7] *continued*

stage. Moreover, no standard for issuance of restraining orders is articulated in current statutes. Should a defendant succeed in transferring or concealing his forfeitable assets prior to conviction, there is no procedure to allow forfeiture of other assets of the defendant to satisfy the forfeiture judgment.

S. REP. No. 225, 98th Cong., 1st Sess. 194 (1983).

[8] *See id.* at 201.

tion; and (2) there was no likely source for the property other than the violation.

CONCLUSION

The Court eliminates any burden on the government to establish a nexus between the interest to be seized and the violation of section 1962. In effect, the Court permits the government to substitute assets currently owned or even later acquired. The Court thus expands the scope of property subject to forfeiture beyond that clearly intended by Congress. Neither the statute itself nor the legislative history of section 1963(a) supports this judicial expansion. We, therefore, respectfully dissent. We would vacate the forfeiture and remand the case to the district court to permit the government to prove by a preponderance of the evidence that the property it seeks to seize was obtained in violation of section 1962 or is traceable to such property.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-13-85—450

APPENDIX B

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(Argued January 25, 1985)

January 29, 1985

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1765 *vs.*

RICHARD A. GINSBURG,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 82 CR 619

Milton I. Shadur,
Judge.

ORDER

Defendant-appellant Richard A. Ginsburg appeals from his sentence following conviction by a jury of racketeering in violation of 18 U.S.C. § 1962, mail fraud in violation of 18 U.S.C. § 1341, and obstruction of justice in violation of 18 U.S.C. § 1510. The sole issue on appeal is whether the district court erred in ordering the defendant to forfeit the sum of $225,000 (representing his interest in legal fees from cases processed at the Cook County Board of Appeals from August 1976 to September 1982) pursuant to 18 U.S.C. § 1963(a)(1) where there had been no showing by the government that the

defendant had an interest in specific property still in existence at the time of conviction. This court has already addressed this issue in two cases factually identical to the present case, holding that under 18 U.S.C. § 1963(a)(1) the government can only recover an interest still in existence at the time of defendant's conviction. *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984); *United States v. McManigal*, 708 F.2d 276 (7th Cir. 1983), *vacated on other grounds*, 104 S.Ct. 419 (1983), *affirmed*, 723 F.2d 580 (7th Cir. 1983). Nothing that the government argues persuades us that these cases should be overruled.

Accordingly, the forfeiture order is VACATED, and the matter remanded for further proceedings as to forfeiture. *See Alexander*, 741 F.2d at 968. The remainder of the district court's judgment, which appellant does not challenge, is AFFIRMED.

APPENDIX C

DOCKET NO. 82 CR 619

JUDGMENT AND PROBATION/ COMMITMENT ORDER

[Docketed May 3, 1984]

In the presence of the attorney for the government the defendant appeared in person on this date: April 26, 1984

COUNSEL

☐ **Without Counsel** — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **With Counsel** — Edward Genson and Jeffrey Steinbeck
Name of Counsel

PLEA

☐ **Guilty,** and the court being satisfied that there is a factual basis for the plea.

☐ **Nolo Contendere,** ☒ **Not Guilty**

FINDING & JUDGMENT

There being a verdict of

☐ **NOT GUILTY.** Defendant is discharged. ☒ **GUILTY.**

Defendant has been convicted as charged of the offense(s) of mail fraud, in violation of T. 18 § 1341, U.S. Code, as charged in counts 1-19 of the indictment, and racketeering, in violation of T. 18 §§ 1962(c) & 1963(a)(1) as charged in count 20.

SENTENCE OR PROBATION ORDER AND SPECIAL CONDITIONS OF PROBATION

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered.

[document partially illegible] on each of counts 1 through 20, the imposition of sentence is suspended and defendant is placed on probation for a period of FIVE (5) YEARS on the general terms & conditions of probation and on the following further conditions:

1) that make restitution in the sum of $150,000.00
2) as to count 20, defendant forfeit the sum of $225,000.00. Any restitution is credited against said forfeiture.
3) that defendant provide community service of a nature and in a program designed in consultation with the probation dept. for a total of 1,000 hours at the rate of 50 hours or more per calendar quarter.

The aforesaid sentence imposed on counts 1-20 is to run concurrently as to each count.

The aforesaid sentence is imposed on the current superseding indictment and on oral motion of the government, all prior indictments are dismissed as to this defendant.

OPTIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation

period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshall or other qualified officer

Signed by U.S. District Judge MILTON I. SHADUR
/s/ Milton I. Shadur

Date April 26, 1984

APPENDIX D

Title 18 U.S.C. §1963, prior to the 1984 amendment, reads in full:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any

other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Organized Crime Control act of 1970, Pub. L. No. 94-452, tit. IX, §901, 84 Stat. 943.

APPENDIX E

Title 18 U.S.C. § 1963, as amended, reads in full:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

[(d) Repealed. Pub.L. 98-473, Title II, § 2301(b), Oct. 12, 1984, 98 Stat. 2192]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive an consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property order forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to

protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a viola-

tion of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims

and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented

at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §302, 98 Stat. 2040.

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR
CLERK

(2)

No. 85-840

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD A. GINSBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his racketeering proceeds are exempt from the pre-1984 forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963(a)(1), because the government failed to prove that he still possessed the money at the time of his conviction.[1]

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and 19 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of five years' conditional probation on all counts and ordered to

[1]Section 1963 was amended in 1984. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192.

forfeit $225,000 of racketeering proceeds, pursuant to 18 U.S.C. 1963(a).[2] A panel of the court of appeals vacated the forfeiture order (Pet. App. 1b-2b). However, the en banc court later reinstated that order (*id.* at 1a-19a).

The evidence at trial is briefly summarized in the opinion of the en banc court (Pet. App. 2a). Petitioner was a partner in a law firm that represented clients before the Cook County Board of (Tax) Appeals between January 1976 and September 1982. During that period, petitioner and his partner, co-defendant Theodore J. Schmidt, bribed employees at the Board of (Tax) Appeals to obtain favorable treatment for their clients. The law firm received $450,000 in legal fees for those cases; petitioner and Schmidt shared the proceeds.

After finding petitioner guilty of mail fraud and racketeering, the jury returned a special verdict of forfeiture, pursuant to Fed. R. Crim. P. 31(e). The district court then ordered petitioner to forfeit $225,000, which represented petitioner's share of the law firm's proceeds for cases before the Board of (Tax) Appeals (Pet. App. 1c-3c).

On appeal, a panel of the court of appeals vacated the forfeiture order, relying on circuit precedent holding that the government could seek forfeiture of interests — in this case, the legal fees — only if the defendant actually still possessed them at the time of conviction (Pet. App. 1b-2b). The en banc court reversed the panel's decision and reinstated the order of forfeiture (*id.* at 1a-19a). The court rejected petitioner's claim that the government was obligated to prove actual possession, at the time of conviction, of forfeitable proceeds. It concluded that neither the plain

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[2]Under the terms of his probation, petitioner is obligated to serve 1000 hours of community service and to make restitution in the sum of $150,000, which would be credited against the forfeiture (Pet. App. 2c).

language of former Section 1963(a) nor its legislative history required that result (see Pet. App. 3a-10a). The court also noted that a subsequent amendment to the forfeiture provision now makes clear that Congress never intended to require proof that the defendant possessed the forfeitable proceeds at the time of conviction (Pet. App. 9a-10a).[3] Two of the eleven judges dissented (Pet. App. 11a-19a).

2. The court of appeals' en banc decision is correct and warrants no further review. It does not conflict with any decision of this Court or another court of appeals. In addition, the question presented is of little continuing importance in light of the congressional amendment of the statute at issue.

The Seventh Circuit, in this case, and the Eleventh Circuit, in *United States* v. *Conner*, 752 F.2d 566 (1985), cert. denied, No. 84-1853 (Oct. 7, 1985), both have rejected the notion that former Section 1963(a)(1) conditioned forfeiture of racketeering proceeds upon the racketeer's actual possession of those funds at the time of conviction. They correctly recognized that an in personam forfeiture of cash proceeds under former Section 1963(a)(1) was a personal money judgment satisfied from a defendant's existing assets, whatever their source. This Court denied a petition for certiorari on that precise issue in *Conner*. The Seventh Circuit's en banc decision, following *Conner*, provides no new reason for this Court's review.

Petitioner contends (Pet. 4-7) that the en banc court incorrectly analyzed the statute and its legislative history. However, he relies (*id.* at 4-5) upon prior panel decisions of the Seventh Circuit that were overruled by the en banc court. There is, accordingly, no currently valid authority supporting petitioner's position. By contrast, the reasoning

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[3]See Pub. L. No. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192.

of the Seventh and Eleventh Circuits is persuasive. Former Section 1963(a)(1) required forfeiture of any interest the defendant acquired or maintained in violation of RICO and contained no requirement that the forfeitable interest be within the defendant's possession at the time of conviction. Congress plainly intended that former Section 1963(a)(1) would exact from racketeers their ill-gotten gains. See *Russello* v. *United States*, 464 U.S. 16, 26-28 (1983). Petitioner offers no explanation why Congress would have exempted from the forfeiture provisions those racketeers who managed to spend, launder or secret away their proceeds prior to conviction.

Finally, we note that the recent amendment of Section 1963 eliminates any need for review by this Court. Under Section 1963, as amended, the government's right to forfeiture of racketeering proceeds vests upon commission of the offense and extends to both property constituting and property "derived from" racketeering profits or proceeds. Moreover, Section 1963 now authorizes a fine of up to twice the amount of any illicit profits or proceeds. Thus, the question presented in this case is irrelevant to future RICO forfeiture actions. Although we believe that the en banc court below correctly resolved the question, its decision will have little continuing importance. Accordingly, review by this Court is unwarranted.[4]

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[4]Petitioner suggests (Pet. 5-6) that the en banc court applied provisions of the new statute in violation of the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. In fact, the court below did no such thing. The court looked to the 1984 amendments as a confirmation of its statutory interpretation and its analysis of Congress's intent in 1970. See Pet. App. 9a-10a. Contrary to petitioner's assertion (Pet. 5), the court did not "retrospectively apply * * * [the new statute] to litigants in the Seventh Circuit."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986